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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA
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12 KRISTOPHER C.,
13 Plaintiff,
14 v.
15 COMMISSIONER OF SOCIAL
16 SECURITY,
17 Defendant.

CASE NO. 3:19-CV-5949-DWC

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

16 Plaintiff filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of
17 Defendant's denial of Plaintiff's application for Supplemental Security Income ("SSI"). Pursuant
18 to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties
19 have consented to have this matter heard by the undersigned Magistrate Judge. *See* Dkt. 3.
20

21 After considering the record the Court concludes the Administrative Law Judge ("ALJ")
22 erred by not providing specific, legitimate reasons for discounting the opinion of examining
23 psychologist Dr. Greenfield and reviewing psychologist Dr. Eisenhauer. Had the ALJ properly
24 considered this evidence, the RFC may have contained additional limitations.

ORDER REVERSING AND REMANDING
DEFENDANT'S DECISION TO DENY BENEFITS

Accordingly, this matter is reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the Social Security Commissioner (“Commissioner”) for further proceedings consistent with this Order.

FACTUAL AND PROCEDURAL HISTORY

5 On September 15, 2009, Plaintiff filed an application for Disability Insurance Benefits
6 (“DIB”) alleging a disability onset date of December 14, 2004. Administrative Record (“AR”)
7 106. Plaintiff’s application was denied initially and upon reconsideration. *Id.* A hearing was held
8 before ALJ Robert P. Kingsley on September 13, 2011. *Id.* On November 17, 2011, ALJ
9 Kingsley issued a decision finding that Plaintiff was not disabled. AR 103-16. The Social
10 Security Appeals Council denied Plaintiff’s request for review on January 4, 2013. AR 121-26.

11 On September 3, 2015, Plaintiff filed new applications for DIB and SSI, again alleging a
12 disability onset date of December 12, 2004. *See* Dkt. 6, AR 15, 335-40, 341-42. Plaintiff was
13 found ineligible for Disability Insurance Benefits, and his application for SSI was denied initially
14 and upon reconsideration. AR 15, 163-66, 167-75, 179-89. A hearing was held before ALJ
15 Marilyn Mauer on June 14, 2017, and supplemental hearings were held on February 2, 2018 and
16 June 25, 2018. AR 47-61, 62-65, 66-102. In a decision dated July 31, 2018, ALJ Mauer found
17 that Plaintiff was not disabled. AR 12-35. The Social Security Appeals Council denied Plaintiff's
18 request for review on August 7, 2019. AR 1-6. The ALJ's decision of July 31, 2018 is the final
19 decision of the Commissioner subject to judicial review. *See* 20 C.F.R. § 416.1481.

20 In Plaintiff's Opening Brief, Plaintiff maintains the ALJ erred by: (1) failing to properly
21 assess opinion evidence from Curtis Greenfield, Psy.D. and Renee Eisenhauer, M.D.; and (2)
22 finding that Plaintiff's Hepatitis C was a non-severe impairment at step two of the sequential
23 evaluation. Dkt. 10, pp. 4-10.

DISCUSSION

I. Whether the ALJ erred in evaluating the medical opinion evidence.

Plaintiff contends that the ALJ erred in evaluating the opinions of examining psychologist Dr. Greenfield and non-examining psychologist Dr. Eisenhauer. Dkt. 10, pp. 5-8.

In assessing an acceptable medical source, an ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)); *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)). When a treating or examining physician’s opinion is contradicted, the opinion can be rejected “for specific and legitimate reasons that are supported by substantial evidence in the record.” *Lester*, 81 F.3d at 830-31 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ can accomplish this by “setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

A. Dr. Greenfield.

Dr. Greenfield examined Plaintiff twice for the Washington Department of Social and Health Services (“DSHS”).

Dr. Greenfield first examined Plaintiff on October 2, 2014. AR 713-17. Dr. Greenfield's evaluation consisted of a clinical interview, a mental status examination, and a review of case notes from Plaintiff's social worker. Based on this evaluation, Dr. Greenfield diagnosed Plaintiff with "Bipolar I Disorder, Manic, Severe without Psychotic Feature" and found that Plaintiff had a range of marked and severe work-related mental limitations. AR 714-15.

1 Dr. Greenfield examined Plaintiff again on December 14, 2017. AR 2238-42. Dr.
2 Greenfield's evaluation again consisted of a clinical interview, a mental status examination, and
3 a review of case notes from Plaintiff's social worker. Based on this evaluation, Dr. Greenfield
4 classified Plaintiff's mental impairment as "Bipolar I Disorder, Current Episode Depressed,
5 Mild" and opined that Plaintiff would have a range of moderate, marked, and severe work-
6 related limitations, and that the overall severity of his impairments would be severe. AR 2239-
7 40. Dr. Greenfield stated that on a more probable than not basis, Plaintiff had reached maximum
8 medical improvement and was not a good candidate for regular participation in the workforce.
9 AR 2241.

10 The ALJ assigned "little weight" to Dr. Greenfield's opinions, reasoning that: (1) Dr.
11 Greenfield assessed essentially the same level of functional limitation in both opinions, even
12 though he first diagnosed Plaintiff with "severe" bipolar disorder and then modified his diagnosis
13 to "mild" bipolar disorder; (2) Dr. Greenfield based his opinions on Plaintiff's subjective reports;
14 (3) Dr. Greenfield's statement that Plaintiff had reached maximum medical improvement and
15 was not a good candidate for regular workforce participation was highly speculative and not
16 consistent with the record as a whole; (4) Plaintiff failed to disclose that he was engaging in
17 under-the-table work; and (5) the limitations assessed by Dr. Greenfield are inconsistent with
18 Plaintiff's activities of daily living. AR 32.

19 With respect to the ALJ's first reason, Dr. Greenfield did assess Plaintiff as having fewer
20 limitations in his 2017 opinion. In his 2014 opinion, Dr. Greenfield opined that Plaintiff had
21 marked limitations in understanding, remembering, and persisting in tasks by following very
22 short and simple instructions and in being aware of normal hazards and taking appropriate
23 precautions, but in his 2017 opinion, Dr. Greenfield assessed Plaintiff as having only moderate
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1 limitations in these functional domains. AR 2240, compare with AR 715. In his 2014 opinion,
 2 Dr. Greenfield found that Plaintiff had severe limitations in understanding, remembering, and
 3 persisting in tasks by following detailed instructions, making simple work-related decisions, and
 4 setting realistic goals and planning independently, but in his 2017 opinion, he found that Plaintiff
 5 only had marked limitations in these domains. *Id.*

6 Further, the language of Dr. Greenfield's opinions is clear that the limitations contained
 7 in his 2014 opinion were assessed during a "manic" phase in Plaintiff's bipolar disorder, while
 8 the limitations in his 2017 opinion were rendered during a "depressive" phase. AR 714, 2239.

9 The Court notes that claimants who suffer from mental conditions may have symptoms
 10 that wax and wane, with downward cycles, cycles of improvement, and mixed results from
 11 treatment. *Garrison v. Colvin*, 759 F.3d 995, 1009 (9th Cir. 2014).

12 Especially when a claimant suffers from bipolar disorder, the symptoms are cyclical, and
 13 a difference in functional capacity between manic and depressive episodes does not necessarily
 14 constitute substantial evidence for purposes of overriding a physician's opinion that a claimant is
 15 significantly impaired. See *Buck v. Colvin*, 540 Fed. Appx. 772, 773 (9th Cir. 2013) quoting
 16 *Agyeman v. I.N.S.*, 296 F.3d 871, 881 (9th Cir. 2002) ("Bipolar disorder is a severe psychiatric
 17 illness marked by *episodes* of mania and depression, impairment of functioning—both cognitive
 18 and behavioral, and is frequently complicated by psychotic symptoms (e.g. delusions,
 19 hallucinations, and disorganized thinking).") (emphasis in original). Accordingly, Dr.
 20 Greenfield's opinions are consistent with his diagnosis of bipolar disorder, and the ALJ did not
 21 provide a specific and legitimate reason for discounting them.

22 As for the ALJ's second reason, an ALJ may reject a physician's opinion "if it is based
 23 'to a large extent' on a claimant's self-reports that have been properly discounted as incredible."

1 | *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (quoting *Morgan v. Comm'r. Soc.*
 2 | *Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999)). This situation is distinguishable from one in
 3 | which the doctor provides her own observations in support of her assessments and opinions. *See*
 4 | *Ryan v. Comm'r of Soc. Sec. Admin.*, 528 F.3d 1194, 1199-1200 (9th Cir. 2008). “[W]hen an
 5 | opinion is not more heavily based on a patient’s self-reports than on clinical observations, there
 6 | is no evidentiary basis for rejecting the opinion.” *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th
 7 | Cir. 2014) (citing *Ryan*, 528 F.3d at 1199-1200).

8 Here, Dr. Greenfield utilized objective measures such as a clinical interview and a mental
 9 status examination in forming his opinion. *See Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir.
 10 2017) (a psychiatrist’s clinical interview and MSE are “objective measures” which “cannot be
 11 discounted as a self-report.”). In his 2017 opinion, Dr. Greenfield stated that while Plaintiff did
 12 not exhibit any symptoms during his examination, he recommended ongoing therapy and
 13 medication “given [Plaintiff’s] history, previous evaluation, and the nature of this diagnosis” and
 14 recommended a medication management service and a protective payee due to Plaintiff’s
 15 frequent manic episodes. AR 2241.

16 Dr. Greenfield was clear that a lack of observable symptoms during his 2017 evaluation
 17 did not mean that Plaintiff’s symptoms had abated, and based his opinion on the history Plaintiff
 18 provided during his clinical interview, previous evaluations, and the waxing and waning of
 19 symptoms typical in individuals diagnosed with bipolar disorder. As such, the conclusion that
 20 Dr. Greenfield relied largely upon Plaintiff’s self-reports in forming his opinion is not supported
 21 by substantial evidence.

22 With respect to the ALJ’s third reason, an ALJ need not accept an opinion which is
 23 inadequately supported “by the record as a whole.” *Batson v. Comm'r of Soc. Sec. Admin.*, 359
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1 F.3d 1190, 1195 (9th Cir. 2004). But an ALJ cannot reject a physician's opinion in a vague or
 2 conclusory manner. *See Garrison v. Colvin*, 759 F.3d 995, 1012-13 (9th Cir. 2014) (citing
 3 *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996)).

4 In stating that Dr. Greenfield's opinion concerning medical improvement and workforce
 5 participation was "highly speculative and not consistent with the record as a whole" the ALJ has
 6 rejected Dr. Greenfield's opinion in a conclusory manner, and has not explained why Dr.
 7 Greenfield's opinion, which was based on his observations and objective findings, was
 8 speculative or inconsistent with the record.

9 As for the ALJ's fourth reason for discounting Dr. Greenfield's opinions, when the work
 10 restrictions assessed by a physician are based on a Plaintiff's inaccurate statements, an ALJ is
 11 entitled to discount a physician's opinion to the extent that the opinion relies on those statements.
 12 *Bray v. Comm'r of Social Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009).

13 Here, the ALJ reasoned that Plaintiff did not tell Dr. Greenfield that he was engaging in
 14 under-the-table work despite his impairments. AR 32. The record contains several ambiguous
 15 statements concerning the nature and extent of Plaintiff's work activity since his application date.
 16 During the hearing, Plaintiff testified that he had not engaged in any work since the prior ALJ
 17 hearing, except for engaging in drug trafficking, for which he served approximately 18 months in
 18 prison. AR 52.

19 The ALJ found that Plaintiff had engaged in "under-the-table" work since 2011, but was
 20 unable to determine the extent of his work activities and earnings during this period. AR 18. The
 21 evidence cited by the ALJ includes an October 2014 office visit during which Plaintiff stated that
 22 he had stopped working in August 2014 due to a fall-related injury. AR 18, 723-24. The ALJ
 23 also cited Plaintiff's July 2016 statements that he injured the back of his hand while "working"
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1 with a piece of metal and that he resumed his drug use because he was “very stressed working 2
 2 jobs.” AR 18, 2102, 2117. The only evidence concerning the nature of Plaintiff’s work activity is
 3 his October 2017 statement that he was performing odd jobs around his building. AR 2218-19.

4 Besides engaging in drug trafficking and performing odd jobs around his building, the
 5 only evidence that Plaintiff engaged in work activity after his application date consists of several
 6 ambiguous statements from Plaintiff made during office visits. Plaintiff told Dr. Greenfield about
 7 his drug-related criminal convictions. AR 714, 2239. There is nothing in the record to suggest
 8 that Plaintiff’s failure to inform Dr. Greenfield about the odd jobs he was doing around his
 9 building had any impact on Dr. Greenfield’s opinion.

10 With respect to the ALJ’s fifth reason, an ALJ may discredit a claimant’s testimony when
 11 the claimant reports participation in everyday activities indicating capacities that are transferable
 12 to a work setting. *See Morgan v. Comm’r Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir.1999).

13 However, disability claimants should not be penalized for attempting to lead normal lives
 14 in the face of their limitations. *See Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998), citing
 15 *Cooper v. Bowen*, 815 F.2d 557, 561 (9th Cir.1987) (noting that a disability claimant need not
 16 “vegetate in a dark room” in order to be deemed eligible for benefits); *see also Vertigan v.*
 17 *Halter*, 260 F.3d 1044, 1050 (9th Cir.2001) (“This court has repeatedly asserted that the mere
 18 fact that a plaintiff has carried on certain daily activities, such as grocery shopping, driving a car,
 19 or limited walking for exercise, does not in any way detract from her credibility as to her overall
 20 disability. One does not need to be ‘utterly incapacitated’ in order to be disabled.”), citing *Fair v.*
 21 *Bowen*, 885 F.2d 597, 603 (9th Cir.1989).

22 Here, the ALJ cited Plaintiff’s ability to perform household chores, attend church, use
 23 public transportation, and play the guitar as being inconsistent with Dr. Greenfield’s opinion. AR
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1 32. Plaintiff's ability to perform these basic activities of daily living cannot serve as a specific
2 and legitimate reason for discounting Dr. Greenfield's opinion. *See Diedrich v. Berryhill*, 874
3 F.3d 634, 643 (9th Cir. 2017) ("House chores, cooking simple meals, self-grooming, paying
4 bills, writing checks, and caring for a cat in one's own home, as well as occasional shopping
5 outside the home, are not similar to typical work responsibilities.").

6 Accordingly, the ALJ did not provide any specific and legitimate reasons for discounting
7 Dr. Greenfield's opinions.

8 **B. Dr. Eisenhauer.**

9 In January 2018, Dr. Eisenhauer reviewed Dr. Greenfield's December 2017 opinion for
10 DSHS. AR 2288-89. Dr. Eisenhauer concluded that Dr. Greenfield's diagnosis and the functional
11 limitations contained in his opinion were supported by the available medical evidence. *Id.* The
12 ALJ assigned "little weight" to Dr. Eisenhauer's opinion for the same reasons she discounted Dr.
13 Greenfield's opinions. AR 33. For the reasons discussed above, the ALJ's evaluation of Dr.
14 Greenfield's opinions is not supported by substantial evidence.

15 **II. Whether the ALJ erred at step two of the sequential evaluation.**

16 Plaintiff maintains that the ALJ erred by finding that his Hepatitis C was a non-severe
17 impairment at step two of the sequential evaluation. Dkt. 10, pp. 8-10. Because Plaintiff will be
18 able to present new evidence and testimony on remand, and because the ALJ's reconsideration of
19 the medical opinion evidence may impact her RFC assessment, the ALJ shall re-consider step
20 two of the sequential evaluation on remand.

21 **III. Remedy.**

22 The Court may remand a case "either for additional evidence and findings or to award
23 benefits." *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1992). Generally, when the Court
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1 reverses an ALJ's decision, "the proper course, except in rare circumstances, is to remand to the
 2 agency for additional investigation or explanation." *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th
 3 Cir. 2004) (citations omitted). However, the Ninth Circuit created a "test for determining when
 4 evidence should be credited and an immediate award of benefits directed[.]" *Harman v. Apfel*,
 5 211 F.3d 1172, 1178 (9th Cir. 2000). Specifically, benefits should be awarded where:

6 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the
 7 claimant's] evidence, (2) there are no outstanding issues that must be resolved
 before a determination of disability can be made, and (3) it is clear from the
 8 record that the ALJ would be required to find the claimant disabled were such
 evidence credited.

9 *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir.
 10 2002). The Court has determined that the ALJ must re-evaluate the opinions of Dr. Greenfield
 11 and Dr. Eisenhauer. The Court further notes that Dr. Eisenhauer, while confirming Dr.
 12 Greenfield's opinion that Plaintiff would have a range of moderate, marked, and severe mental
 13 limitations, also noted that Plaintiff acknowledged a resumption of opioid use two days before
 14 Dr. Greenfield's 2017 examination. AR 2288. Dr. Eisenhauer opined that the limitations
 15 contained in Dr. Greenfield's 2017 opinion would only be valid for 6 months, and recommended
 16 that Plaintiff be re-evaluated following 6 months of sustained sobriety. AR 2289. Therefore,
 17 there are outstanding issues which must be resolved and remand for further administrative
 18 proceedings is appropriate.

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1 CONCLUSION

2 Based on the foregoing reasons, the Court hereby finds the ALJ improperly concluded
3 Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is reversed and
4 this matter is remanded for further administrative proceedings in accordance with the findings
5 contained herein. The Clerk is directed to enter judgment for Plaintiff and close the case.

6 Dated this 16th day of April, 2020.

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9 David W. Christel
10 United States Magistrate Judge

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